Petition

No 81-1721

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TRUETT ALFORD
and
WALTER NIERLICH,
Petitioners

VERSUS

CITY OF LUBBOCK, TEXAS
and
TEXAS MUNICIPAL RETIREMENT SYSTEM,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER EXCLUSION OF WORKERS, HIRED AFTER AGE FIFTY BY THE CITY OF LUBBOCK, FROM PARTICIPATION IN THE TEXAS MUNICIPAL RETIREMENT SYSTEM IS A SUBTERFUGE, UNDER SECTION 4(2) (f) OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT (29 U.S.C. §§ 621–634), TO EVADE THE PURPOSES OF THE ACT.

2. WHETHER A UNITED STATES COURT OF APPEALS, PRESENTED WITH A DISTRICT COURT'S FINDINGS OF FACT THAT AN AGE CLASSIFICATION IS WITHOUT ANY PROVEN OR CONCEIVABLE BASIS IN ACTUAL FACT WHICH MIGHT JUSTIFY IT AS RATIONAL UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, MAY DISREGARD SUCH FINDINGS OF FACT AND RULE THAT THE AGE CLASSIFICATION IS A LEGISLATIVE POLICY CONSIDERATION BEYOND JUDICIAL REVIEW.

3. WHETHER THE EQUAL PROTECTION CLAUSE IS VIOLATED BY A CLASSIFICATION WHICH DENIES PARTICIPATION IN THE CITY OF LYBBOCK'S MUNICIPAL PENSION PLAN, AND DENIES BENEFITS CONTINGENT ON SUCH PARTICIPATION, TO EMPLOYEES HIRED ABOVE AGE FIFTY.

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Truett Alford and Walter Nierlich, Petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in *Alford v. City of Lubbock, Texas*, No. 80-1192, on January 4, 1982.

OPINION BELOW

The opinion of *Alford v. City of Lubbock*, issued by the United States District Court for the Northern District of Texas, is reported at 484 F.Supp. 1001 (N.D. Tex. 1979) and is included in Appendix A hereto, pages A-1–A-13 The Opinion of *Alford v. City of Lubbock*, issued by the United States Court of Appeals for the Fifth Circuit, Unit A, on January 4, 1982, is reported as a Slip Opinion for the *Federal Reporter*, pages 12972–12983, and included in Appendix A hereto, pages A-14–A-33.

JURISDICTION

The judgment of the United States Court of Appeals, Fifth Circuit, was entered on January 4, 1982. (The Fifth Circuit does not record the hour when judgment is entered.) Petition for rehearing has not been made. The jurisdiction of the Supreme Court of the United States is invoked under Article III, Section 2, Clause 1 of the United States Constitution (applying to "Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States"; under Title 28, U.S.C., Section 1331 (federal question); under Title 29, U.S.C., Sections 621–634 (the Age Discrimination in employment Act of 1967); under the Equal Protection Clause of the Fourteenth Amendment; and under United States Supreme Court Rule 17 (Jurisdiction on Writ of Certiorari); and under 28U.S.C. §1254(1) (review of

Court of Appeals by Writ of Certiorari); Petitioners are citizens of the U.S.A.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THIS CASE

Involved in this case are the United States Constitution, Amendment XIV, Section 1 (Set out in Appendix B at page A-34); Title 29, United States Code, §§621(b), 623 (f) (2), and 630(b) (set out in pertinent part in Appendix B at pages A-34–A-35) ; Texas Revised Civil Statutes Annotated, art. 6243h, §§I; II. 14; III.2(b); VIII.6(c); and XIV–XVII (set out in pertinent part in Appendix B at pages A-35–A-38); City of Lubbock, Texas, Ordinances Nos. 1006 (July 13, 1950), 6509–6512 (November 22, 1972), and 7157 (September 9, 1975) (set out in pertinent part in Appendix B at pages A-38–A-40); and Title 29, Code of Federal Regulations, §860.120 (a) (set out in pertinent part in Appendix B at page A-40–A-41).

STATEMENT OF THE CASE: MATERIAL FACTS

Petitioners in this age discrimination case are two employees of the City of Lubbock, Texas, a home-rule municipal corporation. Both Petitioners were forcibly retired on December 31, 1977, having reached age sixty-five within that year.

Petitioner Walter Nierlich ("Nierlich") began working part-time for the City of Lubbock ("City") on November 29, 1962. He was then fifty years and six months of age. He began full-time work for the City one month later, on January 1, 1963, and continued to work full-time for the City until his forced retirement - - a total of more than fifteen years.

Petitioner Truett Alford ("Alford") was fifty-two years and six months of age when hired by the City of Lubbock on March 16, 1965. He worked full-time for the City for twelve years and ten months, until his forced retirement.

The City of Lubbock has participated since 1950 in the Texas Municipal Retirement System ("TMRS"), a pension plan to which both the employee and the City make contributions. TMRS funds are invested and draw annual interest. The TMRS has been often and substantially amended by the Texas Legislature, and the City of Lubbock has adopted by ordinance these amendments, which have so greatly changed rights and obligations between the City and its employees as to constitute new laws, contracts, and plans. The new plans post-date federal enactment of the Age Discrimination in Employment Act ("ADEA") of 1967 (29 U.S.C. §§621–634). The new plans have enlarged employee benefits by raising the level of City "matching" funds from 100% to 150% in 1972, and to 200% in 1973. Employee contributions have been raised from 3% to 5% of gross salary. Credits for past service have been, under the amended plans, substantially augmented.

A coverage exception -- Tex.Civ.Stat.Ann. art. 6243h-III.2 (b) - - denied benefits of the TMRS plan to employees hiring in above the age of fifty. Because of this exception, Petitioners were never permitted by law to join or contribute to the TMRS, though they persistently requested to do so and have at all times during and since their employment been ready, and do now stand ready, to make these contributions. Petitioners have been denied for successive periods the City's 100%, 150%, and 200% contributions, plus accumulated interest on those contributions. Petitioners have also been denied an extensive variety of past service credits which, had Petitioners been permitted by statute to join in the TMRS, would also have substantially rewarded them for their long service. In compensation for their ex-

clusion from the TMRS, Petitioners Alford and Nierlich have been accorded no benefits equivalent to those received by employees hired at an age below fifty. Petitioners missed their regular and deserved merit increases on occasions when that portion of the City budget normally allocated for merit increases was diverted to fund a TMRS "updated service credit" offered to TMRS members only. Petitioners also were denied compensation for accumulated sick leave, which, although administered outside of the TMRS, had been made by the City payable to TMRS members only. For these and other deprivations incurred by Petitioners, the District Court awarded to Alford $5,694.30 in accrued but unpaid sick leave plus interest, and $20,517.42 in contributions by the City into the TMRS, actuarially calculated as a monthly payment, and contigent upon Alford's tendering of $8,383.80 into the System. To Petitioner Nierlich the District Court awarded $3,815.10 in accrued but unpaid sick leave plus interest, and $17,043.17 in contributions by the City into the TMRS, actuarially calculated as a monthly payment, and contigent upon Nierlich's tendering of $7,396.50 into the System. Nor has the City of Lubbock imposed on employees hired at forty-nine or younger any burden offsetting the effect of discriminatory exclusion of Petitioners from the TMRS.

The City of Lubbock's proffered reason for denying TMRS benefits to hirees above the age of fifty is that the TMRS plan is a reward for employees who give long service – a period of fifteen years - - to the City. Hirees over fifty could not satisfy, before their forced retirement at age sixty-five, this fifteen - years period. Yet the average tenure in City employment is higher - - nine years - - for persons hired above the age of fifty, than it is for all City employees - - an average of only eight years. The ironic design of the TMRS - - ironic, that is, unless one assumes that plan was contrived to be illusory - - is that younger employees are eligible for but not interested in or retained by the retirement

plan, while older employees, though they stay in their jobs and want the plan, are ineligible.

Another reason claimed by the City for denying TMRS benefits to hirees above fifty is that costs to the System for such employees are actuarially prohibitive. The District Court found that in point of fact such costs are not prohibitive but would be minimal. The TMRS is a "defined contribution" plan. Moneys paid out are determined by moneys paid in. The plan is said to "vest" in fifteen years. Moneys paid during active employment into TMRS are paid solely by participating employees, who must only serve fifteen years but also work until age sixty to qualify for any matching money from the City at all. Employees quitting without satisfying both these age-sixty and fifteen-year-tenure requirements get back only their own contributions. Moreover, the City of Lubbock does not match from month to month each participating employee's contributions. The City must pay in, when an employee retires, merely an amount sufficient to fund actual monthly retirement payments to those who finally satisfy the age-sixty and fifteen-year service requirements. The City has only a ***potential*** contribution liability, proportional to an employee's years of service, and this potential is not lessened if, upon deciding to fill an employment slot, the City hires a worker below age fifty. The City potentially is going to be contributing to someone.

The TMRS, meanwhile, has no administrative burdens, during a City employee's working years, except computing and holding employee moneys paid toward retirement. Subject only to liberal restrictions as to nature of investments, TMRS is free to and does seek markets and rates of return for these employee moneys, offsetting (and even exceeding) administrative expenses.

Respondents TMRS have characterized Petitioners, in the

courts below, as advocating there be no "vesting" requirements at all for employees covered by the System. That is not Petitioners' position. Petitioners are contending that workers hired above age fifty who cannot serve fifteen years before compulsory retirement should be treated as vested pro rata upon their retirement, for whatever their contributions during years of service have been. (Petitioner Alford, for instance, seeks only to be "vested" for his service, and contributions, of twelve years and ten months). Petitioners are not seeking fifteen years' credit for fewer than fifteen years' work nor are they asking for themselves or any other employees that retirement after age sixty not be a condition for vesting.

STATEMENT OF THE CASE: BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT AND COURT OF APPEALS

Federal Jurisdiction lies because the exclusion of City employees from a pension program devised by a state legislature, administered by a state administrative agency, and adopted by a political subdivision of the state as part of its employee benefit scheme constitutes the necessary state action for Fourteenth Amendment scrutiny. *See Burton v. Wilmington Parking Authority*, 365 U.S. 715, 721–22 (1961). Equal protection scrutiny under the "rational basis" test of *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78–79 (1911), and *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) is the proper Constitutional standard of review for this case. There is federal question jurisdiction arising under 28 U.S.C. §1331 because the TMRS and City of Lubbock have violated Section 4 (f) (2) of the Age Discrimination in Employment Act, 29 U.S.C. §623 (f) (2), by maintaining an employee benefit or retirement plan which is a subterfuge to evade the purposes of the ADEA, especially the purpose of prohibiting arbitrary age discrimination. Each Petitioner also has suffered damages in excess of

$10,000.00. The City of Lubbock is an "employer" under 29 U.S.C. §630(b) (2), since it is a political subdivision of a state; also since it engages in industries affecting commerce and has regularly employed more than twenty employees for the requisite jurisdictional period of 29 U.S.C. §630(b).

REASONS FOR GRANTING THE WRIT

The action of the Court of Appeals was contrary to the following two general considerations of United States Supreme Court Rule 17:

1. ***The Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.***

The Court of Appeals departed not only from precedent but from its very task of judicial review. The District Court had made detailed findings of fact, following the presentation of extensive testimony by Petitioners, by expert witnesses (including a doctor of internal medicine, a labor economist, and a gerontological psychologist, all familiar with the problems of the aging process), by the City of Lubbock's personnel administrator, and by the president of the actuarial consulting firm which designed the TMRS. A District Court's findings of fact in a case challenging class rationality under the Fourteenth Amendment are entitled to great deference. *See, e. g., Jefferson v. Hackney*, 406 U.S. 535, 547 (1972). The District Court below found that the City of Lubbock was without a rational basis for excluding hirees over fifty from the TMRS, and that such an exclusion was in violation of the equal protection clause. In so holding the District Court followed well-settled case law. *See Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78–79 (1911). A classification which is "without any reasonable basis" and therefore "purely arbitrary" is invidious and violates the equal protection clause. *Ferguson v. Skrupa*, 372 U.S.

726, 732 (1963). Mathematical nicety and perfect equality are not required in the classification (*See Estelle v. Dorrough*, 420 U.S. 532, 540 (1975), *reh. denied*, 421 U.S. 921 (1975); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)), so long as stated facts reasonably can be conceived which will justify the classification. *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961). Even those decisions of this Court which do not enumerate, as an element within minimum rationality analysis, the hypothesizing of facts which must justify a classification, clearly include a stating of such facts. *See Jefferson v. Hackney*, 406 U.S. at 549 (state may have concluded aged and infirm were least able to bear hardships of inadequate standard of living); *Dandridge v. Williams*, 397 U.S. at 486 (state may have wished to encourage employment and avoid discrimination between families of working poor and families on welfare). *See also U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, ——— , 101 S. Ct. 453, 461 (1980): "Where. . .there are plausible reasons for Congress' action, our inquiry is at an end."

Finally, the burden is upon the plaintiff to show that a classification is arbitrary. *Morey v. Doud*, 354 U.S. 457 (1957). Petitioners, plaintiff below, carried that burden sucessfully. The Court of Appeals conceded that "Alford and Nierlich have argued cogently that the hardships imposed upon them by this plan are not essential to the state's aims." But the Court of Appeals did not choose to "rebuff" Petitioners' victory below by positing conditions of actual, or even hypothetical fact, which might justify the classification. Instead, the Court of Appeals refused to apply the case law of equal protection, and refused to perform judicial review, reasoning, "We are not insensitive to the weight of these arguments, but their thrust is manifestly grounded in policy considerations which are the responsibility of legislative bodies." To support this conclusion, the Court of Appeals relied upon dicta from its own opinion in *Anderson v. Winter*, 631 F.2d 1238, 1241 (1980): "As we have observed

before in rebuffing a challenge to discrepancies in a state retirement system, '[t]his argument is reasonable, but it is made in the wrong forum. It must be addressed to the . . . legislature.' " In *Anderson*, however, the Court of Appeals fulfilled its task of finding a rational basis for the challenged class. In the case at bar, the Court of Appeals made no such effort.

The Court of Appeals for the Fifth Circuit chose to embark, in the present case, on a "no-scrutiny" approach to legislative classifications, under the guise of a minimum rationality, equal protection analysis. The Fifth Circuit's approach conflicts with that of other Circuits and is a major departure from the accepted course of judicial proceedings. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803): "It is emphatically the province and the duty of judicial department to say what the law is." The Fifth Circuit's "no-scrutiny" approach is also contrary to the more recent decisions of this Court. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976), held that even though classifications are of legislative determination, they still are subject to the rational basis test and judicial scrutiny.

The age classification followed by the City of Lubbock and the TMRS, moreover, is not based upon differences reasonably related to the purposes of the act which sets up the class. The legislature's aim in creating the TMRS was "to provide for the payment of annuities and other benefits to employees. . . of participating numicipalities. . .," Tex. Rev. Civ. Stat. Ann. art. 6243h-I. "Employees," defined in the same legislation at art. 6243h-II.14, are full-time workers who put in more than 1,000 hours per year. No exclusion is made, either in the purposes or definitions sections, of certain age groups. Clearly the purpose of the 1947 legislation, from whose coverage hirees above fifty were excised in 1949, was to include the older workers. The excluding of hirees above fifty not only did not rational-

ly further, but also was diametrically opposed to, the purposes identified by the state. Such a class as does not rationally further the purpose identified by the state offends the equal protection clause. *Murgia*, 427 U.S. at 314; *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17 (1973). Although constitutional principles do not require that a state legislature offer a purpose as a part of every statute, *See U.S. Railroad Retirement Board v. Fritz*, 499 U.S. at _____, 101 S. Ct. at 461, a purpose when stated should be the telling indicator of what class will further a legislative aim or a legitimate state interest. *See Dandridge*, 397 U.S. at 486: "It is enough that a solid foundation for the regulation can be found in the State's legitimate interest in encouraging employment. . ." *See also Jefferson v. Hackney*, 406 U.S. at 544 (Class approved which merely furthered, but did not maximize, Congressional purpose).

Nor does the classification denying Petitioners participation (and benefits contingent on participation) in the TMRS work to further "a legitimate purpose that we may reasonably presume to have motivated an impartial legislature." *U. S. Railroad Retirement Board v. Fritz*, 449 U.S. at _____, 101 S. Ct. at 462 (Stevens, J., concurring). Here there is a clearly adverse impact - - denial of a retirement plan - - upon a disfavored class: hirees over the age of fifty. The disfavor arises because hirees over fifty want the plan and will stay to collect on it. The fifteen-year vesting requirement, however, bars this possibility. Were that fifteen-year vesting rule "an acceptable cost of achieving a larger goal," 101 S. Ct. at 462, all might be well. But as to younger hirees, whose benefit would seem to be the "larger goal" of the fifteen-year vesting rule, the rule is meaningless; real "vesting" means working past age sixty for them. The fifteen-year vesting rule is integral to the illusoriness of the TMRS plan, and it is carefully aimed at the age goup over fifty. On balance, the exclusion of hirees over fifty should not be viewed as "an acceptable cost of achieving a larger goal,"

unless one comfortably can assert that impartial legislatures should have as a legitimate purpose the designing of retirement systems which will not have to pay many benefits, though their avowed purpose is to do so. Neither a "legitimate purpose reasonably presumed," then, nor the stated purpose of the statute, supports the rationality of the classification affecting the Petitioners. And the District Court found that the City's ***ex post facto*** justifications for excluding older hirees - - Respondents' arguments at trial that restrictions on plan participation were cost necessitated, or were functional rewards for long service - - were without rational basis. 484 F. Supp. at 1007.

At the same time the Court of Appeals refused to scrutinize the TMRS age classification, it refused to consider the factfinding of the District Court. Such a refusal was an impermissible departure from the "clearly erroneous" standard of Fed. R. Civ. P. 52(a), and of ***U.S. v. United States Gypsum Co.***, 333 U.S. 364 (1948), ***reh denied***, 333 U.S. 869 (1948). The District Court, in finding the TMRS age classification was arbitrary and without reasonable basis, had made painstaking determinations of fact. ***See Alford v. City of Lubbock, Texas***, 484 F. Supp. at 1007. The "clearly erroneous" standard should have been the means of appellate review.

2. ***The Court of Appeals decided a federal question in a way in conflict with applicable decisions of this Court.***

The Court of Appeals for the Fifth Circuit ruled, affirming the District Court on this point, that the City of Lubbock's TMRS age classification for hirees above fifty was not a "subterfuge" under 29 U.S.C. §623 (f) (2) to avoid the purposes of the ADEA. In so holding, the Fifth Circuit relied, inaccurately, on this Court's opinion in ***United Airlines, Inc. v. McMann***, 434 U.S. 192, 203 (1977), as though ***McMann*** had syllogized that

a) a bona fide retirement plan is one which exists and pays benefits;

b) no bona fide retirement plan can be a subterfuge;

c) therefore, a plan which exists and pays benefits is not a subterfuge.

See Alford, Slip Op. at 13979 and 13981 (Appendix A, pages A-24 and A-29). One searches in vain for such a shallow syllogism in the *McMann* opinion. And certainly, prospective pensioners in this country would have great cause for uneasiness if "bona fide" and "subterfuge" were opposite faces of the same coin. Moreover, *McMann* decided an entirely different question - - whether early *retirement*, forced by terms of a pension plan, is a "subterfuge" to evade the ADEA - - than is presented in this case, which is concerned with subterfuge in pension *participation* or pension *benefits*.

Regarding pension *participation*, the Court of Appeals should have found its clear guidpost, as to what is a "subterfuge" to avoid ADEA purposes, by looking at 29 C.F.R. §860.120, which defined "a subterfuge to evade the purposes of this Act" in the following regulation of the Wage and House Division, Department of Labor (34 Fed. Reg. 9,709 (June 21, 1969)):

> "A retirement , pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage. Further, an employer

> may provide varying benefits under a bona fide plan to employees within the age group protected by the Act, when such benefits are determined by a formula involving age and length of service requirements."

This regulation was the Department of Labor's guideline for testing pension "subterfuge" at all times relevant to this case, until superseded on May 25, 1979 (44 Fed. Reg. 30, 648). The regulation clearly requires that ***some*** cost must be incurred and ***some*** benefit must be paid to older workers, and that costs must, for older and younger workers, be equal within a single year, while benefits may vary under formulas for age and length of service requirements. ***See McMann,*** 434 U.S. at 209–10 (Brennan, J., dissenting): "[Section] 4(f)(2) allows different treatment of older employees only with respect to the benefits paid or available under certain employee benefit plans, including pension and retirement plans." ***See also*** the remarks of Sen. Yarborough, majority manager of the ADEA, at 113 Cong. Rec. 31,255 (1967): "Say an applicant for employment is 55 . . . and the company. . .plan. . .provides . . .moneys will be put up for a pension plan for anyone who worked for the employer for 20 years so that a 55-year-old employee would not be employed past 10 years. . . This will . . . ***limit*** his rights to obtain ***full*** consideration in the pension, retirement, or insurance plan" (emphasis added).

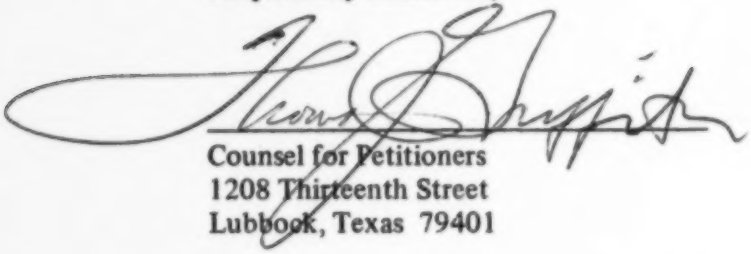
The regulation at 29 C. F. R. §860.120 does not permit such total exclusion of older hirees, as the City of Lubbock and the TMRS practiced. (Nor has the City incurred any other, equivalent cost of behalf of excluded workers, as an alternate way of satisfying the statute and the requirements of the regulation.) The Court of Appeals altogether overlooked this regulation, though it was cited in Petitioners' brief on appeal.

The substantial amendments by the City and state, constituting new and different retirement plans made after the adoption of the ADEA and the cited regulation, violated both the constitution and the national policy expressed by Congress through the ADEA. Even if the TMRS escapes condemnation, judgment should be rendered against the City of Lubbock for the monetary equivalent of its contribution to the TMRS upon Petitioners' compulsory retirement. Such contribution was an inescapable burden upon the City under 29 C. F. R. §860.120.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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March 15, 1982.

Appendix

APPENDIX A

Truett ALFORD and Walter Nierlich,
Plaintiffs,

v.

CITY OF LUBBOCK, TEXAS and Texas Municipal Retirement System,
Defendants.

Civ. A. No. CA-5-78-64.

United States District Court, N.D. Texas, Lubbock Division.

Dec. 18, 1979.

* * * *

MEMORANDUM

WOODWARD, Chief Judge,

The above case came on to be heard by the court without a jury on the 3rd and 4th days of December, 1979, with all parties and attorneys present. After hearing and considering the evidence, arguments of counsel, and the briefs and pleadings of the parties, the court files this memorandum which shall constitute the court's findings of fact and conclusions of law to support the judgment hereinafter ordered. In addition, the court adopts the stipulations of the parties, as contained in the record of this case, as a portion of the court's findings of fact. This case arises under 29 U.S.C. §§ 621-34 and the Fourteenth Amendment, therefore this court has jurisdiction pursuant to 28 U.S.C. §1331.

Plaintiff, Truett Alford, was born on December 28, 1912

and was first employed by the City of Lubbock, Texas on March 16, 1965 at fifty-two years of age. After twelve years and ten months of employment, on December 31, 1977, Mr. Alford was retired by the City in accordance with its policy of retiring all employees at the end of the calendar year in which they attain their sixty-fifth birthday.

Plaintiff, Walter Nierlich, was born on May 3, 1912 and commenced his employment with the City as a carpenter in the Parks and Recreation Department in May or June of 1962 after he had attained his fiftieth birthday. Mr. Nierlich was also retired by the City of Lubbock on December 31, 1977 in accordance with this policy of retiring all employees at the end of the calendar year in which they reach sixty-five years of age.

Both Mr. Alford and Mr. Nierlich had satisfactory records of employment with the City of Lubbock, Texas, had been regularly given merit pay raises, and the court finds that at this time of their retirement on December 31, 1977 each was fully capable of performing the tasks to which each had been regularly assigned.

On July 27, 1950, the City of Lubbock elected to have all employees of the city government, except for the Fire Department, participate in the Texas Municipal Retirement System as same had been previously authorized by the Legislature of the State of Texas (Ordinance 1006, Deft's Ex. 3). The Texas Municipal Retirement System (TMRS) is set forth in Article 6243h of Vernon's Annotated Texas Statutes and allows participation by all municipal employees except those who begin employment after age fifty. This system was originally enacted in 1947 and was substantially revised by the Texas Legislature in 1949. Further, there have been amendments to the TMRS almost every legislative session since that time. Moreover, the provision in TMRS that any city employee who was employed after reaching

the age of fifty would not be eligible to become a member of the system has been consistently carried forward in all of the amendments until recently when the age was raised to fifty-five. To be eligible to receive the pensions provided for under TMRS a city employee must have completed at least fifteen years of credible service and have attained the age of sixty. There are other conditions under which an employee may receive benefits under the Act but they are not applicable to the fact situation of the two plaintiffs in this case. The Act further provides that each city employee shall be retired from employment by all municipalities on the last day of the calendar year in which the age of sixty-five is attained, or on the last day of the calendar year in which he completes fifteen years of credible service, whichever shall last occur. Accordingly, the City has never enrolled in the TMRS any employee who was hired after reaching the age fifty and has, but with only one known exeption, required the employee to retire at the end of the calendar year in which he or she reached sixty-five. The one exception was an accountant for the Municipal Airport who was retained beyond the age of sixty-five in order to train a replacement during a period in which the airport was being constructed. This exception was authorized by the Act but has no bearing on the facts in this case.

Accordingly, the two plaintiffs in this case who were each employed after the age of fifty, were required to retire on December 31, 1977 but they were not afforded any rights under TMRS. It should be noted that because of his age and being allowed to work until December 31, 1977, Mr. Nierlich worked over fifteen years but Mr. Alford's employment was less than fifteen years. During their entire period of employment, the City did not deduct from either plaintiff's pay check the five percent contribution required

by TMRS by the employee nor has the City ever contributed the ten percent required of the city-employer for each employee who is a member of TMRS.

In 1968 Mr. Alford had inquired about his eligibility for retirement and again in 1974 did so, retaining an attorney to assist him. Mr. Nierlich made similar attempts to secure retirement benefits in 1974 but each of the plaintiffs was informed that they would not be accepted as members of TMRS and that they were not eligible to receive any pension benefits. Nothing further was done by these plaintiffs until the filing of this suit after their retirement.

Employees of the City of Lubbock have certain benefits, which are not required by nor included in TMRS, as follows:

(a) Increases in stability or longevity pay were uniformly given and were applicable to employees hired before and after the age of fifty.

(b) Vacation periods were annually granted to the employees, regardless of the age at which they were employed. Further, upon retirement or separation when reaching the age of sixty-five the employee received pay for certain unused vacation time. The plaintiffs in this case received such unused vacation pay when they left the City's employment although they contend that it was tendered late. The court finds, however, that the accrued vacation pay was paid to the plaintiffs in a timely fashion.

(c) The premiums on certain medical and hospitalization insurance policies were paid by the City for all of its employees regardless of their age at the time of their employment.

(d) A group life insurance program was available to the employees, which was geared to the employee's salary,

and could later be converted to a life vesting program. At the time of retirement or separation upon reaching the age of sixty-five without retirement the employee was given a paid-up policy based upon a percentage of the employee's salary. Each plaintiff in this case received such a policy as did the employees who retired with the benefits of TMRS.

(e) Pay for holidays, military leave, and similar benefits were uniformly paid to all employees regardless of the age at which they were employed.

(f) All employees, regardless of the age at which they were employed, were granted fifteen days sick leave per year which could be accumulated. When an employee who had been hired before the age of fifty and was a member of TMRS retired, however, this employee was paid for ninety days of sick leave provided he had previously accumulated same. An employee hired over the age fifty was not given pay for such accumulated sick leave when that employee retired at the age of sixty-five. Therefore, in effect, the two plaintiffs in this case because of their age were not given all of the benefits of employment as were those who were members of TMRS and employed under the age of fifty. The court concludes that the right to receive accrued sick leave upon reaching the age of sixty-five is an emolument of employment as much as a regular pay check would be.

The plaintiffs contend that the defendants have discriminated against them because of their age as shown by the above facts. Because this court is of the opinion that the plaintiffs have timely filed their complaint soon after the denial of certain retirement benefits the court will consider the questions presented. Problems with laches and statute of limitations do not bar this suit because the plaintiffs' cause of action did not arise until the benefits were denied beginning in January of 1978.

The questions before this court therefore are whether any of the acts of the defendants are in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–34; are in violation of Texas statutory guidelines; or are a denial of equal protection under the Fourteenth Amendment and the Texas Constitution. The court would like to point out, however, that since the time this cause of action arose the age limits in the TMRS have been raised by five years each, from fifty and sixty-five to fifty-five and seventy. Therefore, the court will not make any ruling on the present limitations because they are not before the court in this matter. The questions are rather, whether the former limitations affected the plaintiffs in a discriminatory manner.

The ADEA provides standards and guidelines to be applied in cases of alleged age discrimination. The purpose of the Act is to promote the employment of older persons based on their ability rather than age and to prohibit arbitrary age discrimination. *Hodgson v. First Federal Savings & Loan Association*, 455 F.2d 818, 820 (5th Cir. 1972). Section 623(a) of the Act makes it unlawful for an employer to discriminate against an individual because of age. This provision, however, is limited in two respects. At the time this cause of action arose, Section 631 limited the prohibition in the chapter to persons between forty and sixty-five (the upper age limit is now seventy). Additionally Section 623(f) provides that an employer may observe a bona fide seniority or benefit plan such as a retirement, pension, or insurance plan as long as it is not a subterfuge to avoid the purposes of the Act.

The court will first consider the failure of the City to pay accrued sick leave to the plaintiffs. The court is of the opinion that this practice does discriminate against the plaintiffs and is in violation of the ADEA. The City cannot find relief in Section 623(f), the exemption section, because

the policy is not part of any retirement or benefit plan. The practice is an unequal treatment of employees hired after the age of fifty and cannot find approval under the ADEA. A judgment awarding the plaintiffs their accrued sick leave as of December 31, 1977 will be entered together with appropriate interest. Of course, judgment for the accrued sick leave would not be against the TMRS but only against the City of Lubbock.

The refusal of the defendants to allow the plaintiffs to become members of the TMRS must now be considered. The plaintiffs contend that the refusal of the defendants to allow them to participate in the TMRS is a violation of the Equal Protection Clause of the Fourteenth Amendment, the ADEA, Article One, Section Three of the Texas Constitution and also Article 6252–14 of the Texas Statutes. The court will deal with these particular contentions separately.

(a) Article 6252--14 of the Texas Statutes provides that it is the policy of the State of Texas that no person shall be denied the right to work, to earn a living, and to support himself and his family solely because of his age. This particular article was enacted in 1963, some fifteen years after the original creation of the TMRS. The plaintiffs contend that this act impliedly repealed provisions in the TMRS limiting participation to those individuals who began employment under the age of fifty. The court does not accept this argument because any implied repeal would be on very tenuous grounds. Article 6252–14 is general in nature and the TMRS Act is extremely specific, especially regarding age limits. The court will not find a statute to be impliedly repealed unless it is clear that the legislature intended a repeal or there is a positive repugnance between the two statutes. *Goolsby v. Blumenthal*, 581 F.2d 455, 461 (5th Cir. 1978). The court concludes that in this matter such circumstances do not exist. To rule that Article 6252–14 repeals

provisions of the TMRS would be an act of judicial legislation which this court does not judge is warranted. Therefore, the court is of the opinion that Article 6252–14 does not repeal any of the provisions of the TMRS Act and that the TMRS Act is left intact and is unaffected by the subsequent enactment of Article 6252–14.

(b) The plaintiffs also contend that the combination of the provisions disallowing entry into the plan after the age of fifty and the forced retirement at the age of sixty-five creates a subterfuge of the purpose of the ADEA within the ambit of Section 623(f). Indeed, they claim that instead of a bona fide benefit plan which may be lawfully observed, there is no plan regarding these plaintiffs and at age sixty-five they are not retired but rather forcibly discharged. The court is not convinced by this argument and is of the opinion that the TMRS is not a subterfuge of the ADEA. The plaintiffs would have this court give a very wide and liberal reading to the ADEA which the court cannot accept. This court must give a plain reading to the words of the statute and believes that in using the word subterfuge Congress intended that there must be some intent to evade the ADEA. The TMRS was created in 1947 well before the enactment of the ADEA and this court does not find that the statutory plan enacted in the TMRS was a subterfuge to evade the purposes of the ADEA. *See United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203, 98 S.Ct. 444, 450, 54 L.Ed.2d 402 (1977); *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 215 (5th Cir. 1974). Therefore, the court is of the opinion that the TMRS is not in violation of any of the provisions of the ADEA and that the ADEA does not change or alter the TMRS in any way.

(c) The remaining question involves whether the refusal refusal of the TMRS and the City to allow the plaintiffs to participate in the TMRS is a denial of equal protection under the Fourteenth Amendment and under Article

One, Section Three of the Texas Constitution. These two constitutional provisions will be dealt with jointly because of their similarity in meaning and impact. *See Interpretative Commentary*, 1. Tex. Const.Ann. 218–220. For the City and the TMRS to come under such scrutiny, however, state action is required because the Fourteenth Amendment only restricts state action. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 721, 81 S,Ct. 856, 859, 6 L.Ed.2d 45 (1961). Certainly, state action is involved in this case. The exclusion of the plaintiffs from the TMRS by the defendants was pursuant to the TMRS Act which was passed by the state legislature. The dependence of the defendants upon the statute cannot be denied and surely their actions constitute state action. *Cf. Id.*, at 722, 81 S.Ct. at 860.

In a case of denial of equal protection based upon age discrimination this court must look to see if the statute involved can sustain scrutiny under the rational basis test. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976). The question for this court therefore is not only whether the TMRS Act is discriminatory but also whether classifications established in the statutory scheme are supported by a reasonable and rational purpose. *Id.* at 312, 96 S.Ct. at 2566. The record in this case has been carefully examined by the court and it is now for the court to decide whether or not the facts show a rational basis.

During the course of the trial a great deal of evidence was submitted regarding the capabilities of the plaintiffs in particular and of persons sixty-five years of age in general. The City also put on evidence showing that the jobs that the two plaintiffs performed required at least some physical stamina. Along with that evidence the City showed that as one ages a person declines in his ability to perform, his physical stamina, and in his general capabilities. The City also conceded that some sixty-five year old individuals are

quite capable of continuing their employment while others are not. The City further put on evidence to show that retirement at age sixty-five served the City's interest in motivating upward mobility and advancement for its younger workers. From all of these factors, it was the City's position that the age classification it established for retirement was in the public interest and did not deny the plaintiffs equal protection. The court is in agreement and is of the opinion that the City could have rationally concluded that retirement at age sixty-five was rationally related to its interest in effectiveness and economy. *See Johnson v. Lefkowitz*, 566 F.2d 866, 869 (2d Cir. 1977), *cert. denied* 440 U.S. 945, 99 S. Ct. 1421, 59 L.Ed.2d 633.

This finding, however, does not preclude examination of provisions of the TMRS Act which prevented the plaintiffs' participation in the TMRS. The defendants contend that the exclusion of the plaintiffs from the TMRS was actually a service to the plaintiffs. Defendants state that had the plaintiffs been allowed to participate in the TMRS they would have been required to make all the monthly payments up until the age of sixty-five but fail to reap any of the rewards because of insufficient number of years of enrollment in the plan. There is merit to this argument but it fails to state what benefits the plaintiffs received in lieu of the funds paid by the City into the TMRS for those employees who began employment prior to age fifty. It is the position of the plaintiffs that the percentage contributions made by the City into the TMRS for each enrolled employee is as much a part of city salary and emolument as a weekly pay check. Further, plaintiffs claim that when such benefits are given to those employed under the age of fifty, it is mandatory that they be given to those employees hired after age of fifty; otherwise, such action is discriminatory and must be remedied by proper judgment.

Defendants deny that there has been discrimination in

this respect and contend that even assuming *arguendo* that such discrimination were to exist, that a rational basis exists for the exclusion of the City employees who were hired after the age of fifty. To support their position that a rational basis exists for the exclusion of the plaintiffs from the TMRS the defendants allege that a pension would not be meaningful to any employee unless the deductions from the employee's salary and the contributions from the City were made over a sufficient period of time to build up the amount of the pension. Both defendants also contend that the evidence proves that the requirement of fifteen years employment by the City constitutes a reward to an employee for long service. It is the defendants' further contention that the additional cost to the City for inclusion of those employed over age fifty would be prohibitive because of increased administrative expenses to both defendants. The defendants would further show that inclusion of those employees hired after the age of fifty into the TMRS would require the City to reduce its percentage contributions to the TMRS and thereby reduce benefits to all City employees. Finally, the defendants argue that the restrictions of the TMRS such as fifteen years in service rather than at age sixty-five and no enrollment if hired after age fifty, are of legislative determination and that the legislature had a rational basis for these restrictions.

The court finds that the defendants' first two contentions, that the pension would not be meaningful to an employee and that the pension is a reward, are without merit and do not show a rational basis to support the discriminatory denial of pension benefits. Further, the court is not impressed by the argument of the defendants that additional costs to the City and to the TMRS would be so large as to make it uneconomical to enroll persons employed over the age of fifty into the TMRS. Actually, the cost of enrollment of persons hired after the age of fifty into the TMRS would be no more than the cost of enrollment of any other employ-

ee. The only additional costs that would be incurred would be when an employee hired after the age of fifty actually reached retirement age. Figures produced at trial show that number to be minimal and the court finds that payment of pension benefits to these individuals would not be so costly to sustain a rational basis for their discriminatory denial. The court does not believe that the City and the TMRS may justify this discriminatory employment practice solely because it may cost the defendants small additional costs. Likewise, the court does not find that the inclusion of persons hired after tha age of fifty would require the City to make a percentage reduction in their contributions to the TMRS or a reduction in benefits to City employees. As just stated, the percentage of City workers hired after age fifty is very small. Moreover, the pension plan involved here is a defined contribution plan rather than one that depends upon the contributions of others. Because of this fact the inclusion of individuals hired after the age of fifty would not involve the reduction of pension benefits to others. The defendants' final argument that the restrictions are of legislative determination is without merit, also, because even though the restrictions are of legislative determination, they are still subject to judicial scrutiny and the rational basis test. *Murgia, supra,* 427 U.S. at 312, 96 S.Ct. at 2566.

Accordingly, the court is of the opinion that the refusal to enroll the plaintiffs in the TMRS simply because of age was a violation of their equal protection rights under the Fourteenth Amendment. The court finds that their exclusion is not supported by a rational basis and is clearly discriminatory. The court limits its opinion in this regard, however, to the facts before it. Therefore the court finds that the denial of enrollment to the individual plaintiffs with the subsequent denial of pension benefits upon the attainment of the mandatory retirement age of sixty-five was a denial of equal protection. The court makes no ruling with respect to any employee who did not reach the mandatory retire-

ment age while still in the employ of the City. Therefore, it is the order of this court that the plaintiffs tender to the defendants the amount they would have paid into the TMRS during their period of employment with the City had they been enrolled in the TMRS. This amount will be together with interest at six percent per annum. The City is also ordered to pay into the TMRS the amounts they would have contributed for these employees had they been enrolled as members of the TMRS together with interest at six percent beginning with the date such payment ordinarily would have been made. Thereafter, the attorneys for the plaintiffs and for the defendants are to confer and determine what the proper pension benefits would be for each plaintiff had they been enrolled in the TMRS. Payment of the benefits is to commence once that determination is made. Past unpaid benefits will be paid to the plaintiffs in a lump sum plus interest at six percent per annum.

Additionally, attorney for the plaintiffs has pleaded for attorney's fees. Plaintiffs' attorney seeks the recovery of his fees under 42 U.S.C. §1988. That statute does not allow for recovery of attorney's fees, however, when recovery is gained under the ADEA or the Equal Protection Clause. Accordingly, the plea for attorney's fees is denied.

Attorneys for both parties are to confer and submit to the court an appropriate judgment in accordance with this opinion. Attorneys are to approve the judgment as to form only.

West Key Number System

Truett ALFORD, et al.,
Plaintiffs-Appellees,

v.

CITY OF LUBBOCK, TEXAS and Texas Muncipal Retirement System,
Defendants-Appellants.

No. 80-1192.

United States Court of Appeals, Fifth Circuit,*

Unit A

Jan. 4, 1982

* * * *

Appeals from the United States District Court for the Northern District of Texas.

Before INGRAHAM, POLITZ and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Appellant City of Lubbock, Texas (City) elected in 1950 to participate in a retirement and pension program created by the Texas Legislature and administered by an agency of the State of Texas, appellant Texas Municipal Retirement System (TMRS). The TMRS retirement plan. Tex.Rev.Civ. Stat.Ann. art. 6243h, §VII(1) (a) (Vernon 1970 & Supp. 1980–1981), provides that a covered employee is eligible

*Former Fifth Circuit case, Section ((1) of Public Law 96-456 — October 14, 1980.

for service retirement once the employee has attained the age of sixty and has completed fifteen years of service. Most Texas cities, prior to changes in federal age discrimination law, [1] required their employees to retire at the end of the month in which they reached age sixty-five. Not wishing to administer contributions from and, eventually, refunds to employees who could not expect to meet the fifteen-year service requirement, TMRS prior to 1979 excluded from membership any employee hired after his fiftieth birthday[2] 1949 Tex. Gen. Laws, ch. 24 §III(2) (b) at 27. In addition to its voluntary participation in TMRS, the City has followed a separate policy of compensating in cash all employees who retire under the TMRS program for up to ninety days of unused sick leave.

On December 31, 1977, the last day of the year in which they reached sixty-five, appellees Truett Alford and Walter Nierlich were involuntarily retired from their jobs with the City. Because each man had been over age fifty when hired, neither was eligible for membership in TMRS and neither reveived any pension benefits. Moreover, the City refused to pay them for their unused sick leave even though both had accumulated more than ninety days. Alford had worked for the City twelve years and ten months at the time of his retirement. Nierlich, however, had hired on at age fifty in

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1/ The Age Discrimination in Employment Act (ADEA). 29 U.S.C. §631 originally covered employees at least 40 years of age, but less than 65. A 1978 amendn.. ', however, raised the maximum age to "less than 70" Pub. L. No. 95—256 §3(a), 92 Stat. 189 (1978).

2/ In conformity with the 1978 amendments to the ADEA, *see* note 1, *supra*, TMRS was amended to exclude only employees hired at age 55 or over, *i. e.* those who typically cannot hope to serve fifteen years before reaching mandatory retirement at 70. Tex.Rev.Civ.Stat. art. 6243h. §111(2)(b) (Vernon Supp. 1980—1981). This lawsuit commenced prior to this change, however, and the statute in dispute is the pre-1979 version of TMRS.

November of 1962 and thus had been employed by the City fifteen years and one month at the time of his involuntary retirement. Since 1965, the City has followed the rather unusual practice of retiring employees at the end of the calendar year, rather than at the end of the month, in which the employee turns sixty-five 3/ Thus, it has long been possible that an employee hired just after his fiftieth birthday could work over fifteen years and yet not be eligible for retirement under TMRS. This explains why appellant Nierlich worked over fifteen years but was not in the retirement system.

Alford and Nierlich brought suit in federal district court against the City and TMRS, alleging that the defendants' actions in retiring them with no pension benefits and refusing them cash compensation for their accumulated sick leave violated the equal protection clause of the Fourteenth Amendment and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621, 634. They also asserted pendent jurisdiction over claims arising under article 1, section 3 of the Texas Constitution and under Tex. Rev. Civ. Stat. Ann. art 6252–14 (Vernon 1970). 4/

The district court held that the exclusion of Alford and Nielich from the TMRS pension plan had not violated the ADEA, but nevertheless had denied appellants the equal

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3/ The City has raised its mandatory retirement age to 70, in conformity with the 1978 amendments to the ADEA. *See* note 1, *supra*.

4/ The district Court treated the state constitutional issue jointly with the federal claim noting the "similarity in meaning and impact" of the state and federal equal protection clauses. 484 F'Supp. at 1005. It denied any relief under Art. 6252–14. *Id.* Appellees have not urged these claims as alternative grounds in support of their judgment, nor have the issues been discussed in the briefs or at oral argument. Consequently, we do not address them here.

protection of the laws under both the federal and state constitutions. *Alford v. City of Lubbock*, 484 F.Supp. 1001, 1005–07 (N.D.Tex. 1979). It ordered the City and TMRS to pay appellees their pension benefits as if they had been members of TMRS since their hiring, on the condition that the two former employees make contributions equal to those they would have made had they belong to the plan from the beginning. *Id.* at 1007. The district court also held that the City's denial of cash compensation for accrued sick leave violated the ADEA and ordered the City to pay both Alford and Neirlich ninety days of accumulated sick leave with interest. *Id.* at 1005. On appeal, the City and the TMRS challenge the district court's decision that the involuntary retirement of appellants with no pension benefits constituted a denial of equal protection. They also maintain that their refusal to pay older workers not eligible for a TMRS pension for accrued sick leave does not violate the ADEA.

I. EXCLUSION FROM THE TMRS PENSION PLAN

A. The Equal Protection Clause.

Alford and Nierlich alleged that their exclusion from the City's TMRS pension plan denied them the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States. As the district court correctly pointed out, 484 F. Supp. at 1005–06, exclusion of the City employees from a pension program devised by a state legislature, administered by a state administrative agency, and adopted by a political subdivision of the state as part of its employee benefit scheme certainly constitutes the state involvement required to draw our scrutiny under the Fourteenth Amendment. *See Burton v. Wilmington Parking Authority*, 365 U.S. 715, 721–22, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961).

We also agree with the district court's determination that the proper standard under which we must review an allegation of age discrimination under the equal protection clause is the "rational basis" test. ***Massachusetts Board of Retirement v. Murgia,*** 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976). Accordingly, we must determine whether the Texas Legislature's exclusion of employees over age fifty from the TMRS is rationally related to a legitimate, articulated state purpose. *E. g.*, ***San Antonio Independent School District v. Rodriguez,*** 411 U.S. 1, 17, 93 S. Ct. 1278, 1288, 36 L. Ed.2d 16 (1973); ***Seoane v. Ortho Pharmaceuticals, Inc.,*** 660 F.2d 146 at 150 (5th Cir. 1981). As the Supreme Court characterized this type of inquiry in ***Murgia,*** however, it "employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary." 427 U.S. at 314, 96 S. Ct. at 2567. With this admonition in mind, we conclude that the district court erred in holding that the TMRS program denied Alford and Nierlich the equal protection of the laws.

The City and TMRS adduced at trial, and have reiterated in this appeal, several reasons for the exclusion of employees hired after the age of fifty. First, they submit that participation in a pension plan by employees who have put in only a few years of service produces monthly payments so small as to be virtually meaningless. Second, they insist that the fifteen-year service requirement ensures that the pension program will serve as an incentive to younger employees and a reward to those of long standing. Third, they suggest that the administrative costs of including older newly-hired workers are prohibitive, especially when weighed against small monthly benefits resulting from such short-term deductions, and can only dissipate the funds available for providing fringe benefits to employees with long service.

Finally, they remind us that the legislature is the appropriate body to draw the line between those employees who are to be rewarded for their lengthy tenure and those who are to be deemed as having not labored long enough.

As the district court noted in refuting this last contention, the social policies adopted by state legislatures remain subject to judicial scrutiny under the rational basis standard. 484 F. Supp. at 1007 (citing ***Murgia, supra,*** 427 U.S. at 312, 96 S. Ct. at 2566). We find, however, that the actions of the Texas Legislature in this instance are commensurate with our standard of limited review. "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts may be conceived to justify it." ***McGowen v. Maryland,*** 366 U.S. 420, 425–26, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961).

The City and TMRS introduced persuasive testimony at trial to show that pension plans prescribing a term of years in service as a prerequisite to participation are a commonly accepted inducement for steady employment. Even without such evidence, we reasonably may suppose that the prospect of earning membership in a matched-funds benefits program, the participatory right vesting only after fifteen years of service, may not only attract capable employees but also may encourage them to remain. Having remained for the required fifteen years, the senior employee is rewarded with a fully vested interest in a mounting schedule of benefits culminating in a secure retirement. It must be remembered that the TMRS plan does not discriminate against older employees as a class; they are in fact, its principal beneficiaries. Rather, it excludes only the newly-hired older worker who, the Legislature has determined does not require the added incentive nor, having spent much of his working career elsewhere, merit the added reward.

Alford and Nierlich have argued cogently that the hardships imposed upon them by this plan are not essential to the state's aims. They have cast doubt upon the argument that a fifteen-year vesting requirement fosters continuity in employment by introducing evidence to show that the average tenure for employees hired after age fifty is comparable to that for younger employees because of turnover among the latter. They also suggest that the incentive of a pension is, if anything, more "meaningful" to the employee rapidly approaching retirement. Finally, they dispute the argument that the administrative cost of including older newly-hired employees is actuarially prohibitive.

We are not insensitive to the weight of these arguments, but their thrust is manifestly grounded in policy considerations which are the responsibility of legislative bodies. It is entirely possible that the TMRS could achieve its objective of inducing long service from the young–who, after all, could expect substantially higher benefits from a longer tenure–while yet offering some lesser retirement incentives to the newly-hired older worker. It is not for us, however, to decide if such policy considerations are superior. Even a conclusion that they are would not avail these retirees so long as the contrary policy, adopted by the legislature, was not wholly irrational. As we have observed before in rebuffing a challenge to discrepancies in a state retirement system. "[t]his argument is reasonable, but it is made in the wrong forum. It must be addressed to the [state] legislature." *Anderson v. Winter*, 631 F.2d 1238, 1241 (5th Cir. 1980). We cannot impose upon the state our view of what may constitute the fairest or *most* rational scheme. "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct. 1153, 1161, 25 L.Ed.2d 491 (1970). *See also Murgia, supra*, 427 U.S. at 314, 96 S.Ct. at 2567. Since we believe that the TMRS policy of withholding membership from employees hired after age fifty constitutes a rational effect to promote the State's objective of encouraging and rewarding long service among municipal

employees, we reverse the district court's holding that the statutory exclusion denied appellees Alford and Nierlich the equal protection of the laws.

B. The Age Discrimination in Employment Act.

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623(a) (1) makes it unlawful for an employer

> to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . .

Section 4(f) (2) of the Act, 29 U.S.C. §623(f) (2) provides that it is not unlawful for an employer

> to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual . . . .

Before its amendment in 1978, the Act applied to individuals at least forty, but less than sixty-five years of age, 29 U.S.C §631. [5]

The district court found that the involuntary retirement of Alford and Nierlich with no pension benefits did not violate the ADEA because the City and TMRS acted pursuant to the terms of a bona fide retirement plan that was not a subterfuge to avoid the purposes of the Act. 484 F. Supp. at 1005. Alford and Nierlich have maintained throughout this dispute that a retirement plan is not bona fide within the meaning of

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5/ *See* note 1, *supra*.

section 4(f) (2) if it excludes newly-hired older workers from its benefits. [6] They insist, in other words, that a plan paying no benefits to a particular employee is not a bona fide plan with respect to that employee. Alternatively, appellees have argued that the TMRS plan is a subterfuge to avoid the purposes of the Act. Our own careful study of these arguments in light of the language of section 4(f) (2) and the legislative history of the Act has convinced us that the district court was correct in holding that the TMRS plan is bona fide within the meaning of section 4(f) (2) and is not a subterfuge to avoid the purposes of the Act.

In *United Airlines, Inc. v. McMann*, 434 U.S. 192, 98 S. Ct. 444, 54 L.Ed.2d 402 (1977), the Supreme Court held that section 4(f) (2) permits involuntary retirement of an employee prior to age sixty-five under a bona fide retirement plan. The Court also held that a plan established prior to the passage of the Act in 1967 cannot be a subterfuge to avoid its purposes, thereby rejecting the rule, adopted

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6/ Having reversed the district court's judgment for Alford and Nierlich on the equal protection issue, we will consider appellees' alternative contention, omitted from their brief but thoroughly argued at trial and reiterated at oral argument, that their exclusion from the City's TMRS plan violated the ADEA.

While an appellee cannot secure alteration or modification of claims decided adversely to him in a lower court without bringing a cross-appeal, he is free to support the judgment secured below with any matter appearing in the record, including contentions, arguments, or theories specifically repudiated by the lower court as a basis for allowing his claim.

City of Safety Harbor v. Birchfield, 529 F.2d 1251, 1254 n. 4 (5th Cir. 1976) (citations omitted).

by the Fourth Circuit, "requiring an employer to show an economic or business purpose in order to satisfy the subterfuge language of the Act." 434 U.S. at 203, 98 S. Ct. at 450 (footnote Omitted).

There is support for appellees' position, however in the interpretations of the Act adopted by the Department of Labor and the EEOC. On June 21, 1969, shortly after the passage of ADEA, the Department of Labor issued its Interpretive Bulletin, codified at 29 C.F.R. §860. - 110(b), which provided that section 4(f) (2) of the Act "does not apply to the involuntary retirement before sixty-five of employees who are not participants in the employer's retirement or pension program." Since both Alford and Nierlich were over sixty-five when retired by the City, this interpretation was of no assistance to their cause. On May 25, 1979, however, after this case arose, the Department produced a more specific exegesis of section 4(f) (2), now codified at 29 C.F.R. §860.120. Section 860.120(f) (iv) (A) flatly states that "[n]o employee hired prior to normal retirement age may be excluded from a defined contribution plan." [7]

7/ The section provides for certain exceptions to this rule, as follows:

With respect to defined benefits plans not subject to the Employee Retirement Income Security Act (ERISA), Pub. L. 93—406, 29 U.S.C. 1001, 1003(a) and (b), an employee hired at an age more than 5 years prior to normal retirement age may not be excluded from such a plan unless the exclusion is justifiable on the basis of cost consideration as set forth elsewhere in this section. With respect to defined benefit plans subject to ERISA, such an exclusion would be unlawful in any case. An employee hired less than 5 years prior to normal retirement age may be excluded from a defined benefit plan, regardless of whether or not the plan is covered by ERISA. Similarly, any employee hired after normal retirement age may be excluded from a defined retirement plan.
29 C.F.R. §860.120(f) (iv) (A) (1980).

A defined contribution plan is one in which benefits are based upon the amount contributed to the participant's individual account. The TMRS plan adopted by the City is such a plan.

Although enforcement of the ADEA has since become the responsibility of the EEOC, the EEOC's own proposed interpretation of section 4(f) (2), to be codified at 29 C.F.R. Part 1625, incorporates the superseded section 860.120. See 44 Fed. Reg. 68862 (1979) (incorporating 44 Fed. Reg. 30658 (1979)). Thus, both the Department of Labor and the EEOC have taken the position that, with exceptions not applicable here, section 4(f) (2) does not permit an employer to exclude an older newly-hired worker from a defined contribution plan.

Nevertheless, after carefully reviewing the appellees' argument in light of the language of the statute and its legislative history, we conclude, contrary to the interpretation of the Department of Labor and the EEOC, that the TMRS retirement program is a bona fide employee benefit plan entitled to protection under section 4(f) (2) of the Act. The statutory language and the legislative history compel this conclusion.

The city's failure to pay retirement benefits to Alford and Nierlich was obviously in accordance with the terms of its regular TMRS program. Thus, the only question here is whether the City's plan is bona fide and is not a subterfuge to avoid the purposes of the Act. Past judicial interpretations of what constitutes a bona fide plan are not fully enlightening. As defined in *Jensen v. Gulf Oil Refining & Marketing Co.*, 623 F.2d 406, 413 (5th Cir. 1980), "[a] retirement plan is bona fide if it is genuine and pays substantial benefits." The Supreme Court's extensive analysis of section 4(f) (2) in *McMann, supra*, accepted the employee's concession that the plan of which he complained was bona fide

"in the sense that it exists and pays benefits." 434 U.S. at 194, 98 S. Ct. at 446. But it added further guidance by finding that such a plan could not be a subterfuge to violate the statute if it was created before the statute was adopted and not in anticipation of such a statute.

On this ambiguous precedent, we cannot accept appellees' argument that the City's TMRS program is not bona fide because it paid no benefits to *them*.

In explaining its conclusion that a benefit plan providing for retirement of an employee before age sixty-five could still be "bona fide" within the meaning of section 4(f) (2) of the ADEA even as to an employee forced to retire before age sixty-five, the Supreme Court noted indications in the legislative history of the Act that Congress had not intended for the ADEA to interfere with existing pension plans. It quoted Secretary of Labor Willard Wirtz assuring the Senate Subcommittee considering the bill "that the effect of the provision in 4(f) (2) . . . is to protect the application of almost all plans which I know anything about. . . . It is intended to protect retirement plans." 434 U.S. at 199, 98 S. Ct. at 448 (quoting Hearings on S. 830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. 53(1967) [hereinafter referred to as Senate Hearings]). More important, the Court pointed out that section 4(f) (2) of the original bill authorized an employer "to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of the Act. . . ." *Id.*

The interpretation of the Act urged by TMRS is tellingly supported by the role Senator Javits played in the enactment of ADEA, again as reported by the Court in *McMann*. The present language permitting observance of a "bona fide employee benefit plan" was added in response to Sena-

tor Jacob Javits' concern that the original version "did not appear to give employers flexibility to hire older employees without incurring extraordinary expenses because of their inclusion in existing retirement plans." *Id.* at 199–200, 98 S.Ct. at 448–449. Senator Javits specifically suggested "that the age discrimination law should not be used as the place to fight the pension battle but that we ought to subordinate the importance of adequate pension benefits for older workers in favor of the employment of such older workers and not make the equal treatment under pension plans a condition of that employment." *Id.* at 200, 98 S.Ct. at 449. (*quoting* Senate Hearings 27.) The Court's opinion went on to characterize Senator Javits' amendment as "focus[ing] on the *hiring* of older persons notwithstanding the existence of pension plans which they might not economically be permitted to join." *Id.* at 202, 98 S.Ct. at 450.

Even more precisely on point are the remarks of Senator Yarborough majority manager of the ADEA bill, in a dialogue with Senator Javits. As quoted by the Court in *McMann*, Senator Yarborough proposed the following scenario:

> Say an applicant for employment is 55, comes in and seeks employment, and the company has bargained for a plan with its labor union that provides that certain moneys will be put up for a pension plan for anyone who worked for the employer for twenty years so that a 55-year-old employee would not be employed past 10 years. This means he cannot be denied employment because he is 55, ***but he will not be able to participate in that pension plan because unlike a man hired at 44, he has no chance to earn 20 year retirement.*** In other words, this will not disrupt the bargained-for pension plan.

113 Cong. Rec. 31255 (1967) (emphasis supplied) (quoted in 434 U.S. at 202 n.8, 98 S.Ct. at 450 n.8). The Senator's hypothetical situation almost exactly parellels the dispute in this case, except that the TMRS program adopted by the City was even less stringent; it permitted participation by those who could expect only fifteen years of employment.

Moving to the other side of the Congress, we find the House Report commenting that "[the section 4(f) (2) exception serves to emphasize the primary purpose of the Bill—hiring of older workers —*by permitting employment without necessarily including such workers in employee benefit plans.* The specific exception was an amendment to the original bill, is considered vita[l] to the legislation, and was favorably received by witnesses at the hearings." H.R. Rep. No.805, 90th Cong., 1st Sess. 4 (1967), *reprinted* in [1967] U.S.Code Cong. & Ad.News 2213, 2217 (emphasis added).

In sum, our review of the Act's origins convinces us that Congress sought to avoid using this legislation as the ground on which "to fight," in Senator Javits' words, "the pension battle." Rather, Congress was only too aware of the danger involved in drastically altering, in one barely considered proviso, the many pension plans already operative in 1967.[8] Not until 1974, in the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§1001–1381, did Congress address the problems of exclusions, long vesting periods, and adequate pensions. Section 202(a) (2) of ERISA 29 U.S.C.

8/ According to a statement prepared by Anthomy Obadal, U.S. Chamber of Commerce, and submitted to the Senate Subcommittee, "of approximately sixteen thousand pension plans surveyed in 1965, the Department of Labor asserted that "Maximum participation ages were effective in over three-fourths of the plans with over three-fifths of the workers.' One-third of the private pension plans surveyed exclude workers hired at age 55 and over half at age 60." Senate Hearings 106. (Footnote omitted).

§1052(a) (2), provides that, with few exceptions, "[n]o pension plan may exclude from participation (on the basis of age) employees who have attained a specified age . . . ." Sections 201 through 211, 29 U.S.C. §§1051–1061, set forth a detailed scheme of minimum participation and vesting standards. These complexities of ERISA demonstrate the pension battle necessarily was a deparate struggle and that Congress in 1967 intended to leave established pension plans–and the TMRS plan is surely one of a type common at that time–intact until it could consider fully these different issues. The outcome of this pension battle further thwarts Alford's and Nierlich's claims since ERISA is quite clear in exempting pension plans of governmental agencies, 29 U.S.C. §§1002(32), 1003(b) (1) and Congress has not dealt with governmental pension plans in subsequent legislation. We conclude, therefore, that the TMRS plan is a bona fide plan within the meaning of section 4(f) (2) of the ADEA.

Strong support for this conclusion can also be found in the Supreme Court's treatment of a comparable exemption for "bona fide seniority systems" under section 703(h) of the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e–2(h). In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S. Ct. 1843, 52 L.Ed.2d 396 (1977), the Court rejected the government's argument, based upon official Equal Employment Opportunity Commission policy, that no seniority system perpetuating the effects of pre-Act discrimination could be bona fide. Resorting to the legislative history of Title VII for explication of the term "bona fide," the Court determined that Congress had framed the section 703(h) exception in response to concern over the disruptive effect that Title VII might have on existent seniority systems:

It is apparent that §703(h) was drafted with an eye toward meeting the earlier criticism on this issue with an

explicit provision embodying the understanding and assurances of the Act's proponents, namely, that Title VII would not outlaw such differences in treatment among employees as flowed from a bona fide seniority system that allowed for full exercise of seniority accumulated before the effective date of the Act.

431 U.S. at 352, 97 S.Ct. at 1863. The Court thus concluded that it could not "accept the invitation to disembowel §703(h) by reading the words 'bona fide' as the Government would have it do." *Id.* at 353, 97 S.Ct. at 1863. ***See also W.R. Grace & Co. v. Local Union No. 759 Int'l. Union of United Rubber, Cork, Linoleum and Plastic Workers of America,*** 652 F.2d 1248, 1252, 1256 (5th Cir. 1981).

Finally, we conclude that the TMRS program is not a subterfuge to avoid the purposes of the Act. The Supreme Court clearly held in *McMann* that a bona fide retirement plan in effect prior to passage of the ADEA cannot be subterfuge to avoid that Act's purposes. 434 U.S. at 203, 98 S.Ct. at 450. ***See also Jensen v. Gulf Oil Refining & Marketing Co.,*** 623 F.2d 406, 413 (5th Cir. 1980). The passage of TMRS by the Texas Legislature in 1947 and the City's adoption of it in 1950 frees the program at issue here from any further scrutiny. The TMRS plan does not violate the Age Discrimination in Employment Act.

II. THE CITY'S FAILURE TO PAY FOR ACCRUED SICK LEAVE

The district court also held that the City's refusal to pay Alford and Nierlich for their ninety days of accrued sick leave violated the ADEA. 484 F.Supp. 1004–05. We agree. The section 4(f) (2) exemption for bona fide employee benefit plans, discussed at length in Part I(A), *supra,* does not shield the City's discriminatory policy of withholding accrued sick leave pay from employees hired after age fifty

and thus ineligible for retirement under the TMRS plan. The City's sick leave policy forms no part of the TMRS pension plan. [9] The City has undertaken to make eligibility for sick leave pay contingent upon unrelated eligibility for TMRS. This discriminatory administration of a simple fringe benefit cannot by this means he brought under the protection of section 4(f) (2).

The City has defended its position by urging us to consider its sick pay provision as just another part of its "employee benefit plan," even though that provision is not contained in the TMRS and is functionally irrelevant to any "retirement, pension, or insurance plan." We decline to interpret section 4(f) (2) so expansively. True, we have stated before that the key phrase of section 4(f) (2) is "employee benefit plan" and that "[t]he words, 'retirement, pension, or insurance,' are added in a clearly discriptive sense, not excluding other kinds of employee benefit plans if, con-

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9/ At trial, the court and counsel for appellees elicited the following explanation from an Assistant Director of Personnel for the City:

> *The Court:* Is this sick leave pay a part of the Texas Municipal Retirement System?
>
> *The Witness:* No, it is not.
>
> *The Court:* This is a separate policy of the City Government, right?
>
> *The Witness:* It is a separate policy.
>
> Q (by Mr. Griffith:) in other words, this ninety days comes out of the City treasure without regard to contributions to retirement system, is that right?
>
> A: It is completely separate.
>
> Q: There is no provision in the Texas Municipal Retirement System for sick leave at all, is there?
>
> A: No, there is not.

ceivably, there could be any." *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 215 (5th Cir. 1974). [10] However, we do not believe that Congress, in developing the ADEA exemption for employee benefit plans, *see* Part I(A), *supra*, meant to countenance the discriminatory dispensation of all fringe benefits whether or not they are part of a specific and established "benefit plan."

As we have undertaken to explain in detail in Part I(A), *supra*, Congress devised section 4(f) (2) in order to postpone any disruptive effects upon the many complicated pension plans already in force at that time until it could tackle the issue in more considered and comprehensive legislation. The multifaceted TMRS retirement program is, we have held, just such a plan; the City's policy of paying a retiring employee for up to ninety days of unused sick leave—a simple fringe benefit administered in a single, easily calculated payment—is not. Rather, the payment for unused sick leave is akin to the other extra-TMRS fringe benefits that the City voluntarily pays its employees regardless of the age at which they are hired. [11] Lacking the protection of section 4(f)(2), the City's denial of well earned payment for unused sick

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10/ Our opinion in *Brennan* refuted the Secretary of Labor's contention that an employer's "Profit Sharing Retirement Plan" was not a "retirement, pension, or insurance plan" within the meaning of §4(f) (2). Apart from the inclusion of the words "profit sharing" in its title, the plan was just like any other complex retirement package protected by the Act. *See* 500 F.2d at 214—15. Read in context, therefore, our explanation of § 4(f) (2)'s key phrase was directed only toward warding off any absurd emphasis on nomenclature. We did not suggest that § 4(f) (2) exempts all fringe benefits from scrutiny under the Act.

11/ These benefits include increases in stability or longevity pay, vacation periods and payment for certain unused vacation time (which appellees received), holiday pay, and insurance coverage. 484 F. Supp. at 1003—04.

leave to this class of older employees violates section 4(a) (1) of the ADEA, 29 U.S.C. §623(a) (1). [12] We affirm the district court's judgment awarding Alford and Nierlich payment for their accrued sick leave as of December 31, 1977, with appropriate interest.

Having resolved this issue in favor of appellees under the ADEA, we need not address the City's argument that its denial of sick leave payments did not violate the equal protection clause.

III. ATTORNEY'S FEES

Appellees contend that the district court erred in denying them attorney's fees under 42 U.S.C. §1988 when they actually were requesting, and were entitled to, such fees under an entirely different statute, 29 U.S.C. §626(b). We cannot consider this contention. Appellees filed no cross-appeal from the judgment denying them attorney's fees, but merely raised the issue as a cross-point in their answering brief. In the absence of a cross-appeal, an appellee cannot "attack the [district court's] decree with a view either to enlarging his own rights thereunder or of lessening the rights

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12/ The City also argues that its sick leave payment policy cannot violate the ADEA because it is tied to length of service, not to age. This is somewhat disingenuous. An employee who hires on at age 49, and thus is eligible for retirement under TMRS, receives payment for the full ninety days when he retires, whatever his length of service. An employee hiring on one day past the magical age limit of fifty, however, receives nothing for meritorious attendance—again, regardless of how long he has served. We do not mean to suggest that the City cannot in any way scale its fringe benefits, such as vacation time or sick leave, according to length of service. We merely hold that it may not deny an entire class of older employees—those hired after age fifty—*any* participation in a fringe benefit unrelated to a bona fide "retirement, pension, or insurance" plan simply by artifically trying to tie the benefit to such a plan.

of his adversary . . . " *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191, 57 S.Ct. 325, 328, 81 L.Ed. 593 (1937). This rule has been applied specifically to requests for the granting of attorney's fees, *Hadfield v. Ryan Equipment Co.*, 456 F.2d 1218, 1222 (8th Cir. 1972), for the denial of attorney's fees, *Fain v. Caddo Parish Police Jury*, 564 F.2d 707, 709 n.3 (5th Cir. 1977), and for an increase in attorney's fees, *White v. Travelers Indemnity Co.*, 416 F.2d 870, 874 (6th Cir. 1969); *North Texas Producers Association v. Metzger Dairies, Inc.*, 348 F.2d 189, 196–97, *cert. denied*, 382 U.S. 977, 86 S.Ct. 545, 15 L. Ed.2d 468 (1966). The district court's denial of attorney's fees must be affirmed.

We reverse the judgment of the district court awarding retirement pension benefits to appellees Alford and Nierlich. We hold that their exclusion from the TMRS pension program did not deny them the equal protection of the laws. In all other respects, the judgment below is affirmed.

REVERSED IN PART; AFFIRMED IN PART.

APPENDIX B

Constitutional Provisions

Section 1, Amendment XIV. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Federal Statutes

29 U.S.C. §621(b). "It is. . .the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." (P. L. 90-202, §2, 81 Stat. 602 (Dec. 15, 1967).)

29 U.S.C. §623 (f)(2). "It shall not be unlawful for an employer. . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act." (P. L. 90-202, §4, 81 Stat. 603 (Dec. 15, 1967).) 29 U.S.C. §630(b). "The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, that prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the

Government of the United States." (P.L. 90–202, §11, 81 Stat. 605 (Dec. 15, 1967); P.L. 93–259, §28 (a) (1) - (4), 88 Stat. 74 (Apr. 8, 1974).)

Texas Statutes

Tex. Rev. Civ. Stat. Ann. art. 6243h.

"Section I. A retirement and disability pension system is hereby created, to be operated under the management of a Board of Trustees of the Texas Municipal Retirement System, to be maintained and administered in accordance with the provisions of this Act, to provide for the payment of annuities and other benefits to employees and to beneficiaries of employees of participating municipalities in this State. . ." (Acts 1947, 50th Leg., p. 108, ch. 75.)

"Section II.14. 'Employee' means any person who receives compensation from and is certified by a municipality as being a regular full-time employee or as a regular part-time employee employed in a position normally requiring actual performance of duty during not less than one thousand (1,000) hours a year. . ." (Acts 1947, 50th Leg. p. 108, ch. 75.)

"Section III.2.(b). Any person not a member of this System who becomes an employee for the first time of a participating department of a municipality after the effective date of participation of such department[,] shall become a member of the System upon the date such person becomes an employee, provided he is then under the age of fifty (50) years[,] but any such person who is fifty (50) years or over on such date of employment shall not be eligible to become a member of this System." (Acts 1949, 51st Leg., p. 24, ch. 24, art. 1.)

"Section VIII.6(C). The Board shall have full power to sell,

assign, exchange, or trade and transfer any of the securities in which the funds of the System at any time may be invested, and to use or reinvest the proceeds as, in the Board's judgment, the needs of the System require." (Acts 1947, 50th Leg., p. 108, ch. 75.)

"Section XIV. Any participating municipality electing to do so may provide for an increased current service annuity reserve at retirement of employees of such municipality, upon the following terms and conditions:

> 1. The council by ordinance may provide that for each month of current service thereafter rendered by its participating employees, the city will contribute out of its account in the Municipality Current Service Accumulation Fund to the current service annuity reserve of each such member if he retires at the time of his retirement a sum that is either (at the option of the employing municipality) one hundred fifty per centum (150%) of the accumulated deposits of the member for such month of employment, or two hundred per centum (200%) of the member's accumulated deposits for such month."

(Acts 1965, 59th Leg., p. 1571, ch. 682, §§ 1–5.)

"Section XV. Any participating municipality electing to do so may provide for 'special prior service credits' to be allowed as to employees of such municipality retiring subsequent to the effective date of the undertaking of the municipality to provide such increased credits, upon the following terms and conditions:

> 1. The Council by ordinance may provide

that in addition to the 'prior service credit' to be allowed each of its employees holding a prior service certificate which is in effect on the last day of the calendar year in which such proposed change is authorized by the Council, a 'Special Prior Service Credit' shall be granted which shall be an amount equivalent to the accumulation of interest of a series of equal monthly payments of:

a. Two and one-half percent (2–½%) of the members 'average prior service compensation' for the number of months of prior service certified to be in such member's prior service certificate; or

b. Five percent(5%) of the member's 'average prior service compensation' for the number of months of prior service certified to in such member's prior service certificate.

The accumulation above provided shall be at regular interest. . . allowed at the end of each twelve (12) months period. . . ."

"SectionXVI. Subject to the terms and conditions hereinafter stated, any municipality electing to do so may undertake to grant antecedent service credit. . .

3. 'Antecedent Service Credit' shall mean an amount equivalent to the accumulation of interest of a series of monthly payments equal to fifty percent (50%), or at the election of the participating municipality, one hundred percent (100%) of the deposits actually made by the member during each

month of his antecedent service. . . ., such accumulation to be at regular interest."

(Acts 1969, 61st Leg., p. 1146, ch. 371, §§1–8.)

"Section XVII(a). . . .[T]he governing body of a participating municipality by ordinance may authorize the crediting in the retirement system of updated service credits for service performed for the municipality by members. An updated service credit authorized under this section replaces any updated service credit, prior service credit, special prior service credit, or antecedent service credit previously authorized for part of the same service." (Acts 1975, 64th Leg., p. 382, ch. 171, §§1–9.)

Municipal Ordinances of the City of Lubbock, Texas

"ORDINANCE NO. 1006 [July 13, 1950] . . . .BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF LUBBOCK, TEXAS: SECTION 1. THAT . . .the City Commission hereby exercises its option and elects to have the City and all of the employees of all departments, except the Fire Department, participate in the Texas Municipal Retirement System as provided in. . .Article 6243h of Vernon's Annotated Civil Statutes, and all of the benefits and obligations of such system are hereby accepted."

"ORDINANCE NO. 6509 [Nov. 2, 1972]. . . BE ORDAINED BY THE CITY COUNCIL OF LUBBOCK, TEXAS: THAT effective Jan. 1, 1973, for each month of Current Service thereafter rendered by each of its employees who are members of the Texas Municipal Retirement System, the City will contribute to the current service annuity reserve of each such member at the time of his retirement, a sum that is 200% of such member's accumulated deposits. . ."

"ORDINANCE NO. 6510 [Nov. 22, 1972]. . . BE IT

ORDAINED BY THE CITY COUNCIL OF THE CITY OF LUBBOCK:

> Section I. The City. . . hereby elects to have the employees of all participating departments of said city. . .participate in and be covered by the Supplemental Benefits Fund of the Texas Municipal Retirement System. . ."

"ORDINANCE NO. 6511 [Nov. 22, 1972]. AN ORDINANCE UNDERTAKING TO PROVIDE FOR, AND GRANTING 'SPECIAL PRIOR SERVICE CREDIT' UNDER THE TEXAS MUNICIPAL RETIREMENT SYSTEM TO QUALIFYING EMPLOYEES OF THE CITY OF LUBBOCK, TEXAS. . ."

"ORDINANCE NO. 6512 [Nov. 22, 1972]. AN ORDINANCE UNDERTAKING TO PROVIDE FOR, AND GRANTING, 'ANTECEDENT SERVICE CREDIT' UNDER THE TEXAS MUNICIPAL RETIREMENT SYSTEM AT THE RATES HEREIN PRESCRIBED, TO QUALIFYING EMPLOYEES OF THE CITY OF LUBBOCK, TEXAS. . ."

"ORDINANCE NO. 7157 [Sept. 9, 1975].

> Section 1. ***Initial Allowance of Updated Service Credits.***
>
> > a. On the terms and conditions set out in Section XVII of Article 6243h, Vernon's Texas Civil Statutes, as amended 1975, each member of Texas Municipal Retirement System who has current service credit or prior service credit in said system in force and effect on the 1st day of January, 1976. . . shall be and is hereby allowed 'updated service credit' (as that

term is defined in said act) in an amount that is 100% of the 'Base Updated Service Credit' of the member, calculated as provided in said act. The updated service credit hereby allowed shall be in lieu of and in substitution for all Prior Service Credits, Special Prior Service Credits, and Antecedent Service Credits, if any, heretofore allowed such member by reason of service with the City of Lubbock."

Federal Regulations

29 C.R.F. §860.120(a).

"*Costs and benefits under employee benefit plans.*

a. Section 4 (2) (f) of the Act provides that it is not unlawful for an employer. . .' to observe the terms of any bona fide employee. . .retirement. . .plan. . .which is not a subterfuge to evade the purposes of this Act. . . A retirement, pension, or insurance plan will be considered in compiance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage. Further, an employer may provide varying benefits under a bona fide plan to employees within the age group protected by the Act, when such benefits are determined by a formula involving age and

length of service requirements." (34 Fed. Reg. 9, 709 (June 21, 1969).)

Opposition

Supreme Court, U.S.
FILED
APR 15 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TRUETT ALFORD AND WALTER NIERLICH
Petitioners,

vs.

CITY OF LUBBOCK, TEXAS, AND TEXAS MUNICIPAL RETIREMENT SYSTEM,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the provision in the Texas statute creating a retirement plan for city employees that excluded from plan participation new employees over age fifty (and who typically would be discharged at age sixty-five under prevailing city employment policies, before they could complete the fifteen years of service necessary to qualify for plan benefits) constituted a denial of equal protection of the laws to Petitioners as members of the excluded class.

2. Whether, in measuring a state statute for conformance to equal protection standards, the Court of Appeals may uphold the law on any legislative facts furnishing rational basis for the statute, or is the Court of Appeals restricted to ascertaining whether the District Court's judgment striking down the law is "clearly erroneous."

3. Whether entry-age-fifty provisions of the 1949 Texas statute establishing the Texas Municipal Retirement System pension plan make the act a "subterfuge to evade the purposes of" the 1967 federal Age Discrimination in Employment Act.

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No. 81-1721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TRUETT ALFORD AND WALTER NIERLICH
Petitioners,

VS.

CITY OF LUBBOCK, TEXAS, AND TEXAS MUNICIPAL RETIREMENT SYSTEM,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas is reported at 484 F.Supp. 1001.

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 664 F.2d 1263.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered January 4, 1982. No petition for rehearing was filed in that Court. The petition for certiorari was filed March 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE

In addition to the constitutional provisions, statutes, ordinances and regulations cited at page 2 of the Petition for Certiorari (and copied in Appendix B thereof, and which for brevity will not be reproduced here), Section VII(1)(a) of Article 6243h, Vernon's Texas Revised Civil Statutes, is involved in this case. It reads as follows:

> "Sec. VII. 1. Service Retirement Eligibility;
>
> "(a) Any member, after one (1) year from the effective date of his membership, shall be eligible for service retirement who (1) shall have attained the age of sixty (60) years and shall have completed at least fifteen (15) years of creditable service, or (2) shall have completed twenty-eight (28) years of creditable service."

STATEMENT OF THE CASE[1]

Respondent Texas Municipal Retirement System (TMRS) is an agency of the State of Texas which administers a retirement benefit or pension program which the Texas Legislature established (Art. 6243h, Vernon's Tex. Civ.Stat.; 1949 Tex.Gen.Laws, ch. 24) for eligible employees of such Texas cities as voluntarily elect to participate in the plan. The plan requires monthly contributions from participating cities and from each participating employee to provide funding for authorized benefits. [R. 185] At all times material to this case, the plan required a covered

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[1] Almost all evidentiary facts were stipulated. Adopted by reference as part of the District Court's findings of fact (484 F.Supp. at 1002), the Stipulation appears at pages 185-193 of the record in the Court of Appeals, and will be cited here "R." followed by the page number. The other references are to the reporter's Transcript of Proceedings (cited "Tr." with page number) which constituted the remainder of the record in the Court of Appeals.

employee to have performed a minimum of fifteen years of service with a participating city to qualify for service retirement benefits [R. 187; Vernon's Tex.Civ.Stat., art. 6243h, § VII(1)(a)].[2] Persons with lesser service at termination of employment were entitled only to refund of their own contributions, with such interest as had been allowed thereon [R. 188; art. 6243h, § VII(8)].

At all times material to this case, the TMRS statutes excluded from plan membership those persons beginning employment with a participating city who were over fifty years of age at date of employment. Vernon's Tex.Civ. Stat., art. 6243h, § III(2)(b). [R. 186].[3]

It was established that most Texas cities had (prior to 1979) a policy of requiring employees to cease working for the city at the end of the month in which the employee became sixty-five years of age (Tr. 311-312). The purpose of the TMRS plan provision excluding new employees over age fifty was to avoid requiring participation by and contributing from persons who typically could not perform the minimum fifteen years of service prescribed for benefit eligibility before the person's employment would be termi-

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[2] The cited provision of the act allowed retirement benefits beginning at age sixty for the fifteen years of service; allowed retirement at age fifty for twenty-five years of service, and retirement at any age for twenty-eight years of service. [R. 187].

[3] Prior to 1979, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 631 prohibited termination of employment on the basis of age (with certain exceptions) of persons at least forty years of age, but less than sixty-five; the 1978 amendment raised the maximum age to "less than seventy", effective January 1, 1979.

In conformity to the amendment to ADEA, the act governing TMRS was amended to exclude persons newly hired who are fifty-five or more (Chap. 202, Acts.Reg.Sess. 66th Legislature of Texas, 1979) – and who typically could not expect to serve fifteen years before termination of employment at seventy. Since this suit arose in 1978, the pre-1979 provisions of both the ADEA and the act governing TMRS are those applicable.

nated by the city under the prevailing maximum-age-65 employment policies (Tr. 311-312; 318), and who typically would be unable to benefit from participation.

It was established that almost all public retirement plans prescribe minimum periods of service for benefit eligibility; that retirement benefits are customarily regarded as a reward for long public service, and that requirements of ten, fifteen and twenty years of service, coupled with a requirement that the employee reach a minimum age before benefits begin, are typical (Tr. 313-314).

Respondent City of Lubbock, Texas, (City) elected to participate in TMRS in 1950, and since that date all of its eligible employees (excepting those of the Fire Department) have become participants in the plan. [R. 185].

Petitioner Alford was employed by the City on May 16, 1965 when he was fifty-two years of age. Petitioner Nierlich was hired by the City November 29, 1962 at which date he was fifty years old [R. 186-187]. Both men continued to work for the City until December 31, 1977, at which time the City terminated their employment. [R. 186-187] in accordance with a city ordinance adopted in 1965 mandating that every employee cease working for the City at the end of the calendar year in which he or she became sixty-five years of age [Tr. 218-219].[4]

Because each was over fifty years old at time of employment by the City, neither Petitioner was eligible for membership in TMRS, and did not participate in, or make contributions to, the retirement plan. [R. 186-187]. In consequence, neither was allowed or paid any pension benefit by TMRS or the City [R. 191; R. 193]. It was stipulated

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[4] The City raised its maximum employment age from 65 to 70 to conform to the 1978 amendments to ADEA mentioned in footnote 3. [Tr. 218-219, Dft's. Ex. 2].

further that if (contrary to fact) Mr. Alford had been allowed to participate in TMRS, he nevertheless would not have qualified for a retirement benefit because he had performed only twelve years ten months of service (against the required fifteen), and would have been entitled only to refund of any deposits made by him, with interest [R. 191].

Petitioners brought suit in federal district court against the City and TMRS, alleging that their exclusion from participation in the retirement plan and failure to provide them a pension violated the equal protection clause of the Fourteenth Amendment of the Constitution of the United States, and violated their rights under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621-634. The district court held that the exclusion of Petitioners from the TMRS plan was not a violation of the ADEA, but that their exclusion from TMRS and the failure to pay each a pension benefit operated as a denial of the equal protection of the laws in violation of their rights under the Fourteenth Amendment. *Alford,* et al. v. *City of Lubbock,* et al., 484 F.Supp. 1001, 1005-07 (N.D. Tex. 1979). Conditioned that Petitioners make contributions equal in amount to those which they would have made had they been included in the plan at all times during city employment, the District Court ordered the City and TMRS to pay to Petitioners monthly benefits of stated amounts beginning with the month following the termination by the City of their employment, and continuing for life, but with sixty monthly payments guaranteed [R. 247].[5]

[5] Petitioners also sued the City for the amount of ninety-days accrued sick leave which the City refused to pay them under a purely local policy of limiting such payments on termination of employment to employees who were entitled to retirement benefits. The District Court held that this action violated the ADEA, and awarded Petitioners judgment against the City for the amounts involved (484 F.Supp. 1001, 1004-1005). The Court of Appeals affirmed this part of the judgment, and the City did not seek rehearing or other review. In consequence, that issue will not be noticed further in this Brief.

The Court of Appeals reversed the judgment awarding Petitioners pensions, holding that the statutory provision which (prior to 1979) excluded new employees over age fifty from the TMRS plan did not constitute a denial of equal protection, and did not make the plan a subterfuge to evade the provisions of ADEA. (664 F.2d 1266-1271).

SUMMARY OF ARGUMENT

I.

The provisions of the Texas statutes governing the Texas Municipal Retirement System (TMRS) which excluded from participation in TMRS those persons more than fifty years of age at date of initial employment after beginning of the plan is to be measured by the rational-basis test in determining whether it meets equal-protection standards. *Massachusetts Board of Retirement* v *Murgia*, 427 U.S. 307 (1976).

It was established that most Texas cities at all times relevant to this case had and enforced a policy of requiring employees to cease employment with the city when the employee reached sixty-five. Recognizing the fact that this policy would prevent a person hired by a city at age fifty or greater from being able to perform the minimum fifteen-year period of city service required to entitle the employee to retirement benefits in TMRS, and that if such a person were required to participate, he would be subjected to obligations of membership, but could not qualify for retirement benefits, the legislature attempted to solve the matter by excluding those persons hired at age fifty or more from participation in the plan. This provision of the statute is thus a rationally-based "policy choice made by that branch of Government vested with the power to make choices." *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 99 S.Ct. 1355, 1369 (1979).

The fact that the atypical maximum working-age policy of the City of Lubbock (requiring employees to leave City employment at the end of the calendar year, in which the employee reached age sixty-five, rather than at the end of the month as most cities required) enabled Petitioner Nierlich to complete fifteen years in the City's employment before his employment was terminated, does not affect the validity of the statute excluding employees over fifty from participation in TMRS. Since the statutory entry-age rule is rationally-based, incidental inequalities that may arise out of its application to individuals does not condemn the statute. *Phelps* v. *Board of Education*, 300 U.S. 319 (1937).

The provisions of the challenged Texas statute which allow service retirement benefits in the TMRS plan only to plan members who have completed at least fifteen years of service for a participating city, applies to all persons within the jurisdiction seeking to qualify for such benefits. As such, the statute "is one of general applicability and satisfies the equal protection principle without further inquiry." *New York Transit Authority* v. *Beazer*, 400 U.S. 568, 99 S.Ct. 1355, 1366-67 (1979).

It is a legitimate interest of governmental employers, such as cities, to encourage proven employees to continue in their service for long periods. The use by the legislature of a requirement of a fixed period of service (e.g., fifteen years) by a city employee as a condition to award of retirement benefits reasonably may be thought by the legislature to encourage such long service, and such a provision is therefore a rationally-based means of promoting the government's interest. In consequence neither of the provisions challenged by Petitioners violated their rights to equal protection.

II.

State statutes are to be upheld, against equal protection challenges, if there are facts (either in evidence, or which the Court can conceive) that furnish a rational basis for the legislative action. *Vance* v. *Bradley,* 440 U.S. 93 (1979).

Conflicting facts or opinions affecting choice of courses are to be resolved by the legislature, and a federal district court is not authorized to substitute its "findings" for those of the legislature. *Price* v. *Illinois,* 238 U.S. 446 (1915); *Rast* v. *Van Deman & Lewis,* 240 U.S. 342 (1916).

The Court of Appeals was entitled to determine whether the statute had a rational basis conforming to constitutional standards independently of the judgment and conclusions of the District Court.

III.

It is established that provisions in a retirement plan created in 1949 (as was TMRS) cannot be indicted as "a subterfuge to evade the purposes" of the 1967 federal Age Discrimination in Employment Act, 29 U.S.C. § 621-634. *United Airlines, Inc.* v. *McMann,* 434 U.S. 192 (1977).

Post-1949 amendments, which allowed higher benefits to qualifying retirees, but not changing the entry-age, length-of-service requirements, or other provisions as to participation, did not convert TMRS into a new plan to which the *McMann* rule is inapplicable.

ARGUMENT

1. The challenged statute satisfies equal-protection standards.

The Texas statute which Petitioners challenge (Vernon's Tex.Civ.Stat., art. 6243h) is one dealing with fringe benefits (i.e., pensions) allowed for public employment, and

therefore is not one which interferes with exercise of a fundamental right; and the legislative use of age and length of service as a device for measuring eligibility of public employees to receive such benefits does not involve a suspect classification. In consequence, the statute is required only to meet the customary rational-basis test against Petitioners' equal protection challenge, *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307 (1976). In the case at bar, the District Court (484 F.Supp. 1007) and the Court of Appeals (644 F.2d at 1266-1267) agreed that the statute was to be upheld if rationally-based, and indeed Petitioners do not contend otherwise.

The provision of the Texas statute which excluded beginning city employees over age fifty from participation in the pension plan which the statute created was therefore not to be overturned, as this Court has said, "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley,* 440 U.S. 93, 97 (1979); *Barry* v. *Barchi,* 443 U.S. 55, 67 (1979).

The Court of Appeals found rational basis for the challenged entry-age-fifty provision in the fact that it was designed to avoid administration by TMRS of involuntary "contributions from and, eventually, refunds to employees who could not expect to meet the fifteen-year service requirement" for pension benefits, because in less than fifteen years they would reach the age of sixty-five at which most Texas cities (prior to 1979) required their employees to leave city employment. Petitioner Alford's case is indeed a classic example of the situation that the provision was designed to avoid. He was fifty-two years of age at the time he began work for the City, and the City had a fixed employment policy, expressed by ordinance,

requiring all city employees to leave its employment at the end of the calendar year in which the employee became sixty-five. If (contrary to fact) he had been included in the TMRS plan, he would have been required to deposit with TMRS five per cent of each monthly paycheck, but since his employment was terminated by the city, under its local maximum-age policy, after he had worked less than thirteen years, he would not have qualified for any TMRS benefit, but would have been refunded only his own contributions with such interest as was allowed by TMRS on such deposits [R. 191]. In sum his inclusion would have resulted in an enforced low-interest savings account, but would have deprived Petitioner Alford of the right to use his money as he saw fit, including the right to have invested it more productively. The entry-age provision of the statute therefore worked as it was designed to work in the case of Petitioner Alford, i.e., he was allowed to keep and use as he thought best the monthly amounts he would otherwise have been required to deposit in a retirement plan in which he could not qualify for benefits. His case was typical of those employees beginning city employment after age fifty.

On the other hand, since Petitioner Nierlich was hired shortly after his fiftieth birthday in 1952, and the Lubbock ordinance permitted its employees to work until the end of the calendar year in which they became sixty-five, he actually worked fifteen years and one month for the City before the involuntary termination of his employment. If he had been included in the retirement plan, he would thus have qualified for benefits. It is conceded that, as applied to Petitioner Nierlich, the entry-age limitation of the statute did not work well. However, the testimony established that Petitioner Nierlich's situation was atypical of the experience of over-fifty beginning employees as a class.

Even under the Lubbock ordinance (permitting employees to work to the end of the calendar year after their sixty-fifth birthday) it was shown by a study of employees hired at more than fifty years of age that the average service of such employees on termination of employment at sixty-five was nine years; and more significantly, that of all of the class, only one person besides Petitioner Nierlich had finished as much as fifteen years of service [Tr. 235-236]. It was further shown that most TMRS cities required their employees to discontinue employment at the end of the month in which they reached sixty-five — with almost no possibility for an employee to complete fifteen years of service.

The fact that the entry-age provision did not perform well in the atypical case of Petitioner Nierlich did not condemn the classification of the statute. This Court has repeatedly stated that "a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970). More precisely, as the Court observed in *Phelps* v. *Board of Education,* 300 U.S. 319, 324 (1937):

> "Incidental individual inequality resulting in some instances from the operation of the plan does not condemn it as an unreasonable or arbitrary method of dealing with the problem."

The problem which the challenged classification undertook to solve was whether it was better to include, or exclude, persons who typically could not satisfy the length-of-service requirement for benefit eligibility prior to the time that their employments would be discontinued under prevailing City employment practices. The Court of Appeals held, correctly, we submit, that the State's choice of methods for dealing with the preblem was not irrational.

Petitioners assert, however, that the entry-age limitation of the statute is made irrational, and violative of equal protection standards, because "(t)he fifteen-year-vesting rule" (i.e., the requirement of that period of service for service retirement) bars the possibility that "hirees over the age of fifty" can remain in city employment long enough to qualify for benefits [Petition for cert., p. 10].

It is to be noted that the statutory requirement of fifteen years of service for benefit eligibility does not bar any person from working after any age. Instead, the provision of the TMRS statute which allows benefits under the plan only to those persons who perform fifteen or more years of city employment is a rule that applies alike to any person within the jurisdiction who seeks such benefits, and "in that sense the rule is one of general applicability and satisfies the equal protection principle without further inquiry." *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 588 (1979).

Considered as a classification, the requirement of fifteen years of service is rationally based. It hardly needs empirical proof to establish the proposition that the State and its cities have a legitimate interest not only in attracting capable employees into their service, but that they have an even greater interest in encouraging employees of established proficiency to remain long in their service. It is obvious that the device of awarding pensions only to those who remain in employment for fifteen years is an effective, rational and customary method of promoting longer service by employees: such was the testimony at trial. The choice of fifteen years — as against some other number — as the required period of service, is not an irrational act; not is it "directed 'against' any individual or category of persons, but rather it represents a policy choice . . . made by that branch of Government vested

with the power to make such choices." *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 592 (1979).

Respondents therefore submit that the Court of Appeals correctly held that the challenged provisions of the TMRS statute did not violate Petitioners' rights to equal protection of the laws.

2. Appellate review of the statute for conformance to constitutional standards is not restricted by the "clearly-erroneous" rule.

Petitioners say (Petition for cert., p. 11) that "(t)he District Court, in finding the TMRS age classification was arbitrary and without reasonable basis, had made painstaking determination of fact"; and they argue that in reviewing the statute for conformance to equal protection standards, the Court of Appeals was limited to determining whether the District Court's conclusions that no rationale basis in fact existed for the distinction were "clearly erroneous."

This argument misconceives the role of the courts in measuring a statute for conformance to equal-protection standards. In the case at bar, the evidentiary facts were essentially undisputed: indeed, with only two or three exceptions, they were stipulated. That is, the fact that Petitioners had been City employees, their age, dates and length of employment; the fact that they were discharged by the City under its maximum-age ordinances; that they had not been participants in TMRS and the reasons therefor, and that they had not been allowed TMRS pensions, and the reasons therefor, were facts stipulated or undisputed.

Indeed, the only "dispute in the evidence" arose out of the attempt of the opposing parties to furnish expert testimony concerning possible benefits or detriments that the legislature might have considered as flowing from differ-

ing approaches in designing the statute. Thus, testimony produced by Respondents that length-of-service requirements for benefits served to reward long service and to retention of desirable employees was countered by Petitioners' expert testimony that there was no "actuarial justification" for such a prescribed length of service [Tr. 116, et seq.]. We will not relate here the opposing rationales, or policy considerations, developed in the testimony. For as the Court of Appeals correctly observed, the ques- from before the District Court (and before the Court of Appeals) was not whether a different policy would be superior, but whether "the contrary policy, adopted by the legislature" was wholly irrational (664 E.2d at 1267). The fact that there was a conflict in the "evidence" as to opposing reasons or policy considerations did not permit the District Court to adopt as "fact" one view or the other. Instead, the question before the courts at every level at which the statute is reviewed for conformance to equal protection standards is whether any evidence adduced, or any rationale the Court may be able to discern, furnishes rational basis for the legislature's decision. As this Court said in *Rast* v. *Van Demar & Lewis,* 240 U.S. 342, 357 (1916):

> "It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. * * * It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety."

The basic premise of Petitioners' contention is necessarily that a statute cannot be sustained against equal protection challenges except on the basis of empirical evidence offered in the trial court, and that the District

Court's "findings" of irrationality should be given almost conclusive weight. That is merely a rewording of the argument advanced unsuccessfully in *Vance* v. *Bradley*, 440 U.S. 93 (1979) that empirical proof was required to be presented "for the District Court's perusal before the statute could be sustained." Rejecting that argument as applied to equal-protection challenges to a statutory classification, this Court said (440 U.S. at 110-111):

> "In ordinary civil litigation, the question frequently is which party has shown that a disputed historical fact is more likely than not to be true. In an equal protection case of this type, however, those challenging the statute must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."

Under the above decisions, the District Court's conclusion that no rational basis for legislative fact finding existed to support the entry-age-fifty provision of the statute is not a "finding of fact" to be reviewed by the Court of Appeals under the "clearly erroneous" rule. Instead, the District Court's conclusion is one of law which the Court of Appeals (and this Court) reviews independently, *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961), or alternatively a determination of whether there are facts sufficient to meet standards prescribed by the Constitution or statute, which the Court of Appeals (and this Court) likewise reviews free of the "clearly erroneous" rule. *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147 (1950); *Baumgartner* v. *United States*, 322 U.S. 665, 670-671 (1944).

3. The 1949 TMRS retirement plan was not a subterfuge to evade the purposes of the 1967 ADEA.

Lastly, Petitioners contend that, because of the entry-age-fifty provision in the 1949 statute creating the Texas Municipal Retirement System, the plan cannot be considered a "bona fide retirement [or] pension plan, . . . which is not a subterfuge to evade the purposes" of the ADEA, 29 U.S.C. § 621-634, and that the provision is therefore one prohibited by the ADEA. The ADEA, of course, was not enacted until 1967.

In view of this Court's previous consideration and rejection of the same contention in *United Airlines, Inc.* v. *McMann,* 434 U.S. 192 (1977), and the Court of Appeals' careful review and discussion of the issue in this case (664 F.2d at 1267-1271), Respondents will say only that we believe it established beyond need for further discussion that the 1949 act creating the TMRS is not subject to indictment as a plan intended to evade the purposes of the 1967 ADEA.

Petitioners suggest that because of amendments since 1949, TMRS is not to be considered as antedating ADEA, hence *McMann* is not controlling. We would respond by noting that the entry-age provisions and eligibility provisions of the 1949 act were not amended prior to 1979 (at which time the entry-age provision was amended to conform to the 1978 amendments to ADEA). The amendments referred to by Petitioners only provided somewhat greater benefits for plan participants and retirees, but did not otherwise alter the coverage or conditions of the plan. The plan thus in all respects complained of by Petitioners remained the same as it was in 1949 until the 1979 amendments (which, as noted, were made necessary by the 1978 amendments to ADEA).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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